STATE OF CALIFORNIA

432.0042

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition	)	
for Redetermination Under the	)	DECISION AND RECOMMENDATION
Sales and Use Tax Law of:	)	
	)	
J--- F---	)	No. SR -- XX-XXXXXX-010
	)	
	)	
Petitioner	)	

The Appeals conference in the above-referenced matter was held by Staff Counsel Elizabeth Abreu on January 25, 1994 in Oakland, California.

Appearing for Petitioner:	J--- F---
Appearing for the Sales and Use Tax Department:	Bruce Belshaw Senior Tax Auditor Mark Steinberg Senior Tax Auditor

Protested Items

The protested tax liability for the period January 1, 1989 through December 31, 1991 is measured by:

	Item	State, Local and County
A.	Sales claimed under Reg. 1541.5 delivered directly to the buyer	$ 81,915
B.	Sales claimed under Reg. 1541.5 delivered directly to the agent of the buyer	25,786

Petitioner's Contentions

1. The printed sales messages exemption applies to the transactions in issue because the "any other person" requirement in Regulation 1541.5 refers to the seller of the printed materials.

2. Petitioner's customers issued the exemption certificates in good faith, and petitioner relied upon the representations of his customers that the exemption applied to their transactions.

3. Petitioner may have sent some or all of the printed materials in issue to persons other than the purchasers.

4. The auditor allowed the exemption for some transactions which were identical in all material respects with the transactions which were disallowed.

5. The transactions are exempt under subdivision (d)(5) of Regulation 1541.5.

Summary

Petitioner is a printing broker who subcontracts all of his jobs to printers but is the retailer of the printed materials. In some transactions, the printers send the printed materials directly to petitioner who arranges for final delivery of the materials as directed by his customers. In other transactions, petitioner instructs the printers to send the materials directly to the customer, to a mailing house, or to other third parties.

During the period under audit, petitioner sold a variety of printed materials, including printed sales messages. Petitioner had called the Board for advice about the printed sales messages exemption and was sent a copy of Regulation 1541.5.

The auditor performed a test of transactions under $5,000.00 and found no errors. The auditor reviewed on an actual basis transactions which equaled or exceeded $5,000.00. There were 68 such transactions during the audit period. The auditor disallowed eleven of the transactions for which petitioner had claimed the printed sales messages exemption. The basis of the disallowance was that the printed materials were delivered to the purchaser or the purchaser's agent. In addition, some of the materials were not printed sales messages.

Petitioner agreed at the conference that the O--- T--- transaction in the amount of $7,996.00 was not an exempt transaction. With respect to the remaining ten transactions, petitioner stated that he showed Regulation 1541.5 to some of his customers. Both his customers and petitioner concluded that the "any other person" requirement in the regulation referred to any person other than the seller of the printed materials. Petitioner also concluded that the exemption applied to any transaction in which the customer gave away the printed sales messages. Where a customer purchased thousands of brochures, it was obvious that the customer would give the brochures away.

Petitioner stated that the customers issued the exemption certificates in good faith and that he relied upon the representations of his customers that the exemption applied to their transactions. He contends that the regulation is written for the customer and that where the customer believed the regulation applied to a transaction and signed an exemption certificate, petitioner should not be liable for tax.

Alternatively, petitioner argues that even if he and his customers misinterpreted Regulation 1541.5, some or all of these transactions may be exempt because he may have sent the printed materials to persons other than the purchaser. Because his business has large numbers of transactions, petitioner does not have space to keep all documents relating to each transaction. Therefore, petitioner does not have the documentation in each of these transactions to show where he sent the printed materials.

Three of the transactions involved sales of printed sales messages to M--- H---. During the audit petitioner had stated to the auditor that he suspected that the printed sales messages were sent to the real estate agents working for M--- H---. At the conference, petitioner noted that his comment to the auditor was mere speculation and that he did not know for sure to whom the printed materials were delivered. It could have just as well been sent to persons other than employees of M--- H--- or its real estate agents. Furthermore, even if the materials were sent to real estate agents, these agents may not have been M--- H---' agents.

Petitioner pointed out that he makes every effort to comply with the law as shown by the facts that the auditor found no errors in the test sample and that petitioner had treated most of the large transactions correctly. Petitioner also contends that the auditor had allowed the exemption for some transactions which were identical in all material respects with the transactions which were disallowed. Petitioner's last contention is that the transactions are exempt under Regulation 1541.5(d)(5).

Analysis and Recommendation

Revenue and Taxation Code section 6051 imposes a sales tax on all retailers measured by their gross receipts from retail sales of tangible personal property. All gross receipts from sales of tangible personal property are presumed taxable until the contrary is established. (Rev. & Tax. Code section 6091.)

It is well established by the California courts that the Board cannot, in the absence of specific statutory authority, exempt a tax liability. (Pacific Pipeline Construction Company v. State Board of Equalization (1958) 49 C. 2d 729.) When a right to an exemption from tax is involved, the taxpayer has the burden of proving this right to the exemption (H. J. Heinz Company v. State Board of Equalization (1962) 209 Cal.App.2d 1). Any taxpayer seeking exemption from tax must establish that right by the evidence specified by the regulation. A mere allegation that sales are exempt is insufficient (Paine v. State Board of Equalization (1982) 137 Cal.App.3d 438). The Board has the power to prescribe the manner of proof for an exemption (American Distilling Co. v. Johnson (1955) 132 Cal.App.2d 73).

Revenue and Taxation Code section 7051 authorizes the Board to prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of the Sales and Use Tax Laws. Regulations have the force and effect of law. (Associated Beverage Company, Inc. v. State Board of Equalization (1990) 224 Cal. App. 3d 192, 201.)

Pursuant to the authority of section 7051, the Board adopted Regulation 1541.5 which sets forth in detail the requirements of the printed sales messages exemption in Revenue and Taxation Code section 6379.5. The exemption applies to certain sales of "printed sales messages" which means and is limited to catalogs, letters, circulars, brochures, and pamphlets printed for the principal purpose of advertising or promoting goods or services. The term does not include items such as calendars, notepads, or directories unless they meet the principal purpose of advertising or promoting goods or services. (Reg. 1541.5(a)(1). **[Author's Note: This last sentence needs clarification. The word "they" refers to directories. Items such as calendars, posters, and notepads may not be PSMs. Ltr. sent to pet. clarifying this point.]**

For a sales transaction to be exempt under Regulation 1541.5, the printed sales messages must be received by any other person at no cost to that person who becomes the owner of the printed material. (Reg. 1541.5(b)(3).) "Any other person" means any person, other than the purchaser or the purchaser's agent, who takes physical delivery of the printed sales messages and who exercises dominion and control over the property. (Reg. 1541.5(a)(6).) This requirement applies even if the seller is an advertising agency and the seller has the printer arrange for the shipment. (Reg. 1541.5(d)(5).) The exemption does not apply if the seller has the printed sales messages delivered to the purchaser or purchaser's agent even though the purchaser distributes the printed sales messages to other persons free of charge.

Any seller claiming an exemption for the sale of printed sales messages must obtain and retain supporting evidence of the delivery of the property. (Reg. 1541.5(c).) If delivery is by the seller, the seller should obtain and retain U.S. Postal receipts or bills of lading. If delivery is by a mailing house acting as agent of the purchaser, the contract of sale should specify to whom the property was delivered. Whether delivery is by the seller or by a mailing house, the seller must obtain and retain a timely exemption certificate, taken in good faith, from the purchaser. The exemption certificate must state that the printed sales messages will be delivered at no cost to another person who becomes the owner of the printed material. (Reg. 1541.5(c)(1) and (2).)

A copy of an exemption certificate, accepted in good faith, relieves the seller from liability for sales tax for the sale of printed sales messages delivered in accordance with subdivision (b)(2) and (b)(3) of Regulation 1541.5. However, if the seller fails to deliver the printed sales message in such manner, e.g., the seller has the printed materials delivered to the purchaser or the purchaser's agent, the seller will not be relieved from liability for the sales tax. (Reg. 1541.5(c)(3).)

Regulation 1541.5(d)(5) provides that if the requirements of the exemption are otherwise met, the exemption applies to a transaction in which an advertising agency is the seller of the printed materials but contracts with third parties to do the printing and mailing.

After the conference petitioner provided copies of documents relating to the transactions in dispute. The brochure for the A--- C--- S---, entitled “Breast Self-Examination: A New Approach,” does not advertise goods or services and therefore is not a printed sales message. Petitioner did not include samples of the N--- W--- T--- Brochure for the City of F--- or the poster calendar for one of the O--- T--- transactions. It is unclear from the documents provided whether these items were printed sales messages. In any event, as will be discussed below, petitioner has not shown that these items were sent to someone other than the purchaser.

Petitioner’s invoices have “Sold To” and “Shipped To” blocks. Petitioner printed the name of the customer and the customer’s address in the “Sold To” block. The “Shipped To” block has preprinted words in it which read: “SAME IF NOT FILLED IN.” With respect to six of the seven transactions in dispute (not including the sales to M--- H---), petitioner’s invoices either had petitioner’s name or no notation other than the preprinted words in the “Shipped To” block.

In most cases, petitioner’s purchase orders to his printers listed the customer in the “Shipped To” block. However, petitioner showed through other documents that despite what the purchase order indicated, in several transactions the printer sent the printed materials directly to petitioner, not to petitioner’s customer. Thus, petitioner argues, since the purchase orders were not always accurate, the notations in the “Shipped To” block on his invoices were not necessarily accurate.

Petitioner does not have any documents such as postal receipts or bills of lading to show where the printed materials were sent. In the absence of such documentation, petitioner is unable to show that the invoices are inaccurate or that petitioner sent the printed materials to someone other than the customer. Therefore, the exemption does not apply, and these six sales are taxable.

For the T--- sale in the amount of $13,849, the “Shipped To” block does not list the addressee but has an address different from the address of the customer shown in the “Sold To” block. Petitioner also submitted an exemption certificate from T--- which indicates that a mailing house would deliver the printed materials. Based on these documents, it is concluded that the catalogs for this transaction were delivered by petitioner to a mailing house, so that this sale should be considered as an exempt sale of printed sales messages.

In each of the M--- H--- sales, petitioner sold model home brochures of the type commonly provided at model homes in new housing developments. The invoice for one of the M--- H--- sales describes the property as the “T--- P--- Brochure.” The purchase order directs petitioner to ship the brochure to T--- P---. For another sale, the invoice describes the property as the “A--- Brochure.” The address in the “Shipped To” block is A---, which is a M--- H--- development. The invoice for the last transaction in issue shows the brochures were shipped to L--- C---, a M--- H--- development which was part of the S--- of D---.

Since all of these brochures were sent directly to locations owned by M--- H---, it is concluded that an employee or agent of M--- H--- received the brochures. Since the purchaser or purchaser’s agent received possession of the brochures, the exemption does not apply to these transactions.

Petitioner submitted copies of documents for two transactions in which the auditor allowed the exemption. In one transaction the “Shipped To” block listed the O--- A---, which was not the purchaser. Given the facts available, it does not appear possible to distinguish the second transaction from the other taxable transactions in issue. However, the audit staff may have had other information from which it concluded that this transaction was not taxable.

Recommendation

Delete the TMI sale from the measure of tax. Otherwise, redetermine the tax without other adjustment.

Elizabeth I. Abreu, Staff Counsel

Date